

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
SUFFOLK COUNTY WATER :
AUTHORITY, : 17-CV-6980 (NG) (RLM)
Plaintiff, :
May 20, 2021
:
V. : Brooklyn, New York
:
THE DOW CHEMICAL COMPANY, :
et al., :
Defendant. :
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: SCOTT MARTIN, ESQ.
STEPHANIE BIEHL, ESQ.

For the Defendant: STEVEN DILLARD, ESQ.
ROBB PATRYK, ESQ.
KEVIN VanWART, ESQ.
JED WINER, ESQ.
JOEL BLANCHET, ESQ.

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1 THE COURT: This is Judge Mann on the line.
2 I'm conducting a telephonic hearing on a discovery
3 dispute in a series of related cases. The lead case is
4 Suffolk County Water Authority v. Dow Chemical Company,
5 et al., 17-CV-6980.

6 I hope everyone is safe and healthy. I'm
7 going to begin by taking the roll call. Please let me
8 know whether you expect to be the person speaking on
9 behalf of a particular party so I'll particularly focus
10 in on you and remembering your names. But I do ask,
11 given the number of individuals involved, if you
12 identify yourself for the record before you speak
13 unless it's obvious from the context who is speaking.
14 The other preliminary matter is that I would ask anyone
15 who is not speaking to mute your audio so that we're
16 not plagued with feedback or extraneous noises.

17 All right, I'll hear first -- who is on the
18 line on behalf of plaintiffs' counsel -- on behalf of
19 the plaintiffs. I think we have three different groups
20 of plaintiffs over these dozens of cases.

21 MR. MARTIN: Your Honor, it's Scott Martin
22 from the Hausfeld firm in New York. I am safe,
23 healthy, and fully vaccinated, and I will be speaking
24 on behalf of Suffolk County Water Authority and in
25 particular with respect to the motion to compel for the

1 responses to the interrogatory.

2 THE COURT: All right, and I assume you have
3 other members of your team who are on the line, so if
4 they would identify themselves as well.

5 MR. LEWIS: Richard Lewis from Hausfeld.

6 MS. BERAN: Katie Beran from Hausfeld.

7 MS. BAYOUMI: Jeanette Bayoumi from
8 Hausfeld.

9 THE COURT: Anyone else? I'm sorry, I
10 couldn't hear your name.

11 MS. HERMAN: (Ui) Herman from Hausfeld.

12 MS. BIEHL: Your Honor, this is Stephanie
13 Biehl from Sher Edling, also on behalf of Suffolk
14 County Water Authority and all other plaintiffs, except
15 for Hicksville Water District and New York American
16 Water. I have on the line with me my colleagues, Katie
17 Jones and Matt Edling. I will be speaking on behalf of
18 plaintiffs with respect to the motion to compel certain
19 documents.

20 THE COURT: All right. And for the
21 remaining plaintiffs?

22 MR. SCHIRRIPA: Good afternoon, your Honor.
23 This is Frank Schirripa from Hach Rose Schirripa and
24 Cheverie on behalf of New York American Water. Along
25 with me is my colleague, Hillary Nappi, and co-counsel

1 Mary Jane Bass from the Beggs & Lane law firm.

2 THE COURT: All right. And do you expect to
3 be arguing or are you deferring to Mr. Martin and Ms.
4 Biehl?

5 MR. SCHIRRIPA: I'm deferring to Mr. Martin
6 and Ms. Biehl with respect to common issues and
7 responses as addressed in our letters. But if there
8 are specifics with respect to American Water, I will be
9 addressing those.

10 THE COURT: All right. I believe we have --
11 do we have one remaining plaintiff?

12 MS. FACTOR: Yes, your Honor. That's the
13 Hicksville Water District, and my name is Lilia Factor
14 from Napoli Shkolnik. And like my colleague, I will
15 chime in for anything specific to my client but
16 otherwise defer to the other plaintiffs' counsel.

17 THE COURT: All right. And is anyone on the
18 line with you on behalf of your client?

19 MS. FACTOR: No, your Honor.

20 THE COURT: Who do I have on the line on
21 behalf of the Dow Chemical Company?

22 MR. VanWART: Your Honor, you have four of
23 us. It's Kevin VanWart and Nader Boulos. We're with
24 Kirkland & Ellis, and on the line with us are Joel
25 Blanchet and Andy Devine from Phillips Lytle. Mr.

1 Blanchet will be handling the bulk of the argument.

2 THE COURT: All right. We have several
3 other defendants.

4 MR. DILLARD: Yes, your Honor. This is Mr.
5 Dillard, Steven Dillard, along with my colleague,
6 Felice Galant, on behalf of Vulcan.

7 THE COURT: And do you expect to be
8 primarily deferring to Mr. Blanchet in his arguments?

9 MR. DILLARD: I think primarily, your Honor,
10 but we may wish to supplement something that may be
11 specific to our client or that we feel should be
12 fleshed out a little bit more, but primarily deferring
13 to Mr. Blanchet.

14 THE COURT: All right, we have additional
15 defendants. Shell Oil?

16 MS. BRILLAULT: Good afternoon, your Honor.
17 This is Megan Brillault and I'm with the law firm of
18 Beveridge & Diamond, and I will be deferring primarily
19 to Joel for argument.

20 THE COURT: All right. And Proctor &
21 Gamble?

22 MR. WINER: Good afternoon, your Honor.
23 It's Jed Winer from the law firm of Weil Gotshal &
24 Manges. It's just me on the line for P&G. Like Mr.
25 Dillard said, I'll be largely deferring to Mr.

1 Blanchet. But if something comes up specific to
2 Proctor & Gamble, I may chime in, or if there's
3 something else that I feel should be fleshed out a
4 little bit.

5 THE COURT: All right. Is there anyone on
6 the line, a participant, who has not stated that
7 person's appearance?

8 MR. PATRYK: Robb Patryk and Amina Hassan
9 (ph) from Hughes Hubbard & Reed for defendant Ferro
10 Corporation.

11 MR. PATRYK: Good afternoon, your Honor.
12 It's Robb Patryk from Hughes Hubbard & Reed. I
13 represent Ferro Corporation, one of the defendants. My
14 colleagues, Domina Hassan (ph) and Sharon Tabatabai I
15 believe are on the line with me. Like Mr. Dillard, I
16 will refer to Mr. Blanchet unless there's something
17 specific to Ferro that needs to be addressed.

18 THE COURT: Okay. Did you say Mr. Patryk?

19 MR. PATRYK: Yes.

20 THE COURT: All right. Anyone else who I
21 may have missed. All right, so I think we've accounted
22 for all the participants. This is on to address the
23 two motions and responses that have been filed.
24 There's a motion to compel a response to
25 interrogatories as well as a motion to compel the

1 production of documents. Both motions were filed on
2 behalf of the defendants and were objected to by the
3 plaintiffs.

4 Let me just address one of the issues that
5 was raised by plaintiffs' counsel in response.
6 Plaintiffs' counsel has complained that with respect to
7 a number of the disputes, that the defendants have
8 failed to meet and confer as required by both the local
9 rules and the Federal Rules of Civil Procedure. I do
10 note that there has been a back-and-forth exchange of
11 letters between the two sides. I say the two sides
12 since we're dealing with multiple parties on each side.
13 A meet and confer can be satisfied by an exchange of
14 documents. It doesn't have to be a physical meeting or
15 even a telephone discussion if the parties in good
16 faith are attempting to resolve or at least narrow
17 their discovery disputes through written
18 communications.

19 That said, having reviewed the parties'
20 submissions, I am concerned that what's been going on
21 is that there's a back-and-forth in which each side is
22 simply digging in its heels, is trying to make a record
23 that it could then append to its motion or response to
24 the motion with the Court, in part to get around the
25 three-page limit and in part to be able to site

1 something alleged to be in support of the position that
2 that party is taking. In other words, I don't feel
3 like there really has been a sufficient exchange of
4 arguments and compromise by either side in this case.
5 And as we go through these issues, I think that will
6 become more apparent in terms of the Court's thinking,
7 and I hope that, going forward, I'm not going to be
8 confronted with a similar-type situation.

9 So what I'd like to do, even this was not
10 the order of filing, I would like to first address the
11 motion to compel documents. There are a series of
12 categories of documents that the defendants are
13 complaining were not sufficiently responded to. The
14 first such category of documents is the electronic
15 database of groundwater test results. The plaintiffs
16 respond that with the exception of Suffolk County Water
17 Authority, none of the plaintiffs or their consulting
18 engineers have electronic databases of test results.

19 So as an initial matter, just to focus this
20 discussion, do the defendants concede that what we're
21 talking about is whether or not Suffolk County or the
22 SCWA has sufficiently responded to this motion -- to
23 the document demand?

24 MR. BLANCHET: Your Honor, it's Joel
25 Blanchet from Phillips Lytle on behalf of Dow. I think

1 that's accurate. We accept the representation that
2 they don't have electronic databases except for Suffolk
3 County Water Authority. We're not looking to secure
4 information that doesn't exist, so I think that issue
5 has been narrowed to the electronic database in Suffolk
6 County Water Authority's possession.

7 THE COURT: All right, so I will -- to the
8 extent that the motion applies to any of the plaintiffs
9 other than SCWA, I'm going to deem the motion
10 withdrawn. Now, as I understand the parties' positions
11 with respect to SCWA, there in effect are two issues.
12 The first is whether testing results other than one for
13 dioxane and related contaminants are relevant, and
14 secondly, whether the production of the entire database
15 that's been demanded would be unduly burdensome.

16 The plaintiffs have indicated that they have
17 produced testing results relating to dioxane and
18 related contaminants and in the papers, I've seen
19 differing -- a differing count as to whether the
20 related contaminants are four or five. It's not a
21 consistent number. But I guess -- I guess my first
22 question for plaintiffs' counsel is, do I understand
23 correctly that the only testing results that have been
24 produced are testing results for dioxane and what you
25 refer to as related contaminants, either four or five

1 of them?

2 MS. BIEHL: This is Stephanie Biehl for the
3 record. No, your Honor, additional testing results
4 have been produced on behalf of all plaintiffs,
5 including Suffolk County Water Authority for non-
6 dioxane related contaminants. Such examples include
7 things like annual water quality reports, quarterly
8 sample reports, and where other ad hoc sample reports
9 have been pulled and appear in the ordinary course of
10 Suffolk County Water Authority business.

11 THE COURT: I'm actually surprised to hear
12 that. So are you saying that the database contains all
13 sampling results but then apart from the database,
14 there are these other reports and those have been
15 produced?

16 MS. BIEHL: That's correct, your Honor.

17 THE COURT: Since I haven't seen a sample of
18 a report of that nature, would those reports be
19 inclusive of all contaminants that have been found?

20 MS. BIEHL: No, your Honor. In some
21 instances, that could be the case but most likely, it
22 is a vast majority of other contaminants that Suffolk
23 County Water Authority is required to test for. That
24 would be in a report such as the annual water quality
25 report. It also could be other attributes that are

1 non-chemicals, of P.H. levels of particular water
2 samples that could appear in a particular report, and
3 that may or may not be in reports like annual water
4 quality reports or other ad hoc sampling reports. The
5 database itself includes all contaminants ever tested
6 for by Suffolk County Water Authority.

7 THE COURT: I understand that but your
8 answer confused me. So what is contained in the annual
9 and quarterly reports? Are contaminants included? I
10 thought you said no.

11 MS. BIEHL: They are but they are not all
12 contaminants that Suffolk County Water Authority has
13 ever tested for in its history. There are specific
14 contaminants that the state and other regulators
15 require the water providers to test for, which is
16 anywhere from 20 to 50 chemicals, depending on the
17 year. That is what is included in an annual water
18 quality report. But Suffolk County Water Authority
19 itself tests for over 400 chemicals and attributes per
20 year. Not all 400 of those would appear in any given
21 annual water quality report.

22 THE COURT: When plaintiffs say in their
23 letters to the Court and between counsel that they have
24 produced the sampling results for dioxane and the
25 related contaminants, can you explain what you mean by

1 related contaminants and how is a determination made as
2 to what is related? This may be information that all
3 of you have at your fingertips but the Court doesn't.

4 MS. BIEHL: Of course, your Honor. There
5 are five total contaminants. One of those is one for
6 dioxane. Four we have informally called the related
7 contaminants and those are chemicals that are tested
8 for from what we call the parent product, which is TSA,
9 which you've seen in the papers, and related
10 contaminants to that, which are breakdown products,
11 sometimes called daughter products. That's DCE and
12 DCA. There's one other potentially related
13 contaminant, which is called TCE. At the beginning of
14 the discovery process in this case, all of the parties
15 agreed that those were the five contaminants that would
16 be exchanged, and that has been the report that Suffolk
17 County Water Authority produced that is over 500,000
18 lines of results dating from 2003 to 2019.

19 THE COURT: Well, you say that those were
20 the ones that the parties agreed would be produced.
21 Unless I missed something, I didn't see that in your
22 letter in opposition and, frankly, I'm a bit surprised
23 to hear that. If the parties had agreed to that, then
24 why are we even addressing that issue?

25 MS. BIEHL: I don't know if it's in our

1 letter. I can check that for you, your Honor, but it
2 has been agreed to and those are the five contaminants
3 that were specified in the fact sheets, and both sides
4 agreed to the fact sheets after extensive negotiations.
5 So I don't know why we're here on contaminants other
6 than those five but that was what was agreed to during
7 the fact-sheet process over two years ago now.

8 MR. BLANCHET: Your Honor, it's Joel
9 Blanchet. I can address that.

10 THE COURT: All right, go ahead.

11 MR. BLANCHET: Okay. The context here is
12 important to understand why the testing database is so
13 important. At the beginning of this case, when we
14 received the complaint, it was unclear exactly the
15 scope of plaintiffs' claims. There were allegations
16 about contamination in wells that came from defendants
17 spanning the 70-year time period. To help suss that
18 out, we agreed to set aside initial disclosures under
19 the Federal Rules and work on fact sheets that would
20 give each party a chance to better understand the
21 claims at issue.

22 As part of that, we zeroed in on, what are
23 the key points that we can start with to help determine
24 what wells are at issue. Because the complaint focused
25 on dioxane and TCA and we were working to efficiently

1 gather information in a cooperative way, we narrowed
2 down our request to testing for dioxane and the
3 breakdown products of TCA. That was in lieu of initial
4 disclosures.

5 Since then, and this is the important part,
6 it's become clear that plaintiffs' claims are very
7 broad. They allege contamination occurred in 600-plus
8 wells across Long Island over a 70-year time period.
9 The facts that complicate the inquiry into each of
10 those 600-plus wells is, whose product is in that well
11 and where did it come from? There are multiple parties
12 that aren't part of this case right now who, like some
13 of the defendants, produced TCA solvents and sold them
14 and put them in the market. They're not in front of
15 the Court. The question becomes, what responsibility
16 if any do any of those parties have for contamination
17 that exists in any of these wells?

18 Another complicating factor is, the
19 defendants before this Court -- insolvents are not the
20 only source of dioxane. As everyone will agree, there
21 are an undefined universe of mass-produced consumer
22 products that contain dioxane. Those may be a source
23 of contamination in some of these 600-plus wells. The
24 other key fact here is that none of the defendants that
25 are in this case are accused of releasing dioxane into

1 the environment. They did not operate facilities on
2 Long Island, they have not been held responsible
3 parties under CERCLA or RCRA.

4 So there are a group of third parties that
5 released dioxane somewhere, either because they're
6 using mass-produced products as part of a residential
7 use or they were associated with a facility on Long
8 Island that was using solvents including TCA and
9 possibly other solvents that at some point over the
10 last 70 years, entered the ground water and after
11 entering ground water, made their way to one or more of
12 the 600-plus wells at issue.

13 The other important thing to keep in mind is
14 that these releases occurred, and this is right in
15 plaintiffs' complaint, at various times, at various
16 locations, and in various amounts. The other thing to
17 keep in mind that's unstated but implicit in the claim
18 is that the releases occurred of different products,
19 not necessarily the products associated with the
20 defendants on the line, at different times, involving
21 different warnings and different product literature,
22 and with different outcomes as a result of that
23 contamination.

24 The Long Island Aquifer is not a swimming
25 pool. It is not the case where a drop of dioxane goes

1 into the aquifer and it spreads across the thousand-
2 plus square miles of Long Island and penetrates every
3 well. Each well is separate and that's what we're
4 talking about here. Each of the 600-plus wells at
5 issue in this case is separate. The dioxane that's in
6 those wells came from different releases at different
7 times, of different products, involving different
8 parties.

9 That's what makes the access to the entire
10 testing database so critical here, because in one spot,
11 a well may be contaminated pretty clearly from a known
12 environmental site, where there's been a RCRA or a
13 CERCLA or a state superfund investigation and we know
14 who those third parties are. In other spots, there may
15 be a well that has dioxane in it but it's not
16 especially clear where the dioxane came from, and
17 that's what we need to figure out for 600-plus wells.

18 This isn't novel. It's something that can
19 be done and is done. It is the basis for state
20 superfund laws. There are investigations -- when
21 contamination is found, there are investigations to
22 find where that contamination came from, and then
23 consent degrees or agreements to clean it up in one way
24 or the other. The complicating factor here is not the
25 actual work. That's tried and true work and one of the

1 things that is used by consultants and remediation
2 specialists to determine where the contamination came
3 from is a comparison between all the contaminants that
4 may exist in a well and all contaminants that have been
5 identified at a different site.

6 THE COURT: Hello?

7 MR. BLANCHET: Yes.

8 THE COURT: I'm sorry, you're breaking up.

9 MR. BLANCHET: I'm sorry, I'll try to speak
10 up, your Honor.

11 THE COURT: No, you're breaking up so it's
12 not that -- I think there's a problem with the
13 connection. I don't know if it's on your end or mine,
14 but you cut off mid-word. Can you hear me?

15 MR. BLANCHET: I can hear you. Can you hear
16 me?

17 THE COURT: I can but you said -- you were
18 talking about, to determine where the contaminants come
19 from, and you said you compare, and you cut off.

20 MR. BLANCHET: Okay, I can pick up from
21 there. There is a profile of contaminants in, for
22 example, a Suffolk County drinking well. That is, at a
23 certain point in time, the contaminants -- it may be
24 dioxane but it may also contain contaminants completely
25 unrelated to dioxane, so benzene or something else.

1 And the way to figure out where that dioxane came from
2 is to take the whole of the contaminant profile in the
3 well and then take -- compare that to, for example,
4 known superfund sites, where the testing at the site
5 and they have a suite of chemicals.

6 If the suite of chemicals from a known
7 superfund site matches up to a suite of chemicals
8 that's found in an individual supply well, it's pretty
9 good evidence that there is a connection between that
10 superfund site, which may be a mile away, maybe a half
11 mile away, maybe three miles away, and the supply well.
12 And then remediation decisions and responsibility for
13 the contamination of that supply well can be drawn.

14 The issue here is we have a lot of wells.
15 Long Island is home to over 440 state superfund sites,
16 each of which has different histories with different
17 products and different contaminants. So to get to the
18 bottom of that, it can be done but it's a lot of work.
19 And what the consultants need is access to a database
20 that contains the full suite of testing data for the
21 wells that Suffolk County has, so that we can go back
22 to environmental investigations that have been done at
23 known sites and compare those. It's a methodology that
24 is used all the time.

25 The database itself -- I'm surprised at the

1 notion that this is somehow burdensome for plaintiffs
2 to produce. It is electronic, it can be -- it's not a
3 person in a warehouse making copies or digging through
4 files to locate them. We are more than happy to work
5 with plaintiffs to overcome any technical issues and if
6 there's a good reason why portions of that database are
7 not easily copied or we're not easily given access to
8 them, we're happy to work with them on that.

9 But what we've received is -- since we've
10 made the request for the entire database 14 or 15
11 months ago, what we've received is varying degrees of,
12 well, let's talk about it some more or it's burdensome
13 but let's talk about it some more. We're at a point
14 now where we have deadlines that are coming up fast for
15 the identification and the naming of third parties, so
16 access to that database and the ability to manipulate
17 it in the same way that Suffolk County is able to is
18 critical to solving these problems and getting to the
19 bottom of these issues for the 300-plus wells that
20 Suffolk County has in play, in an efficient and timely
21 manner.

22 THE COURT: Well, one of the objections that
23 plaintiffs raised is that when they asked you to
24 describe the contaminants -- you know, what
25 contaminants do you need, that you didn't come back and

1 suggest a subset. I understand you're now saying you
2 need the entire database. Did you actually talk with
3 plaintiffs' counsel in the way you just relayed to the
4 Court as to why you need this? Did you suggest that
5 perhaps you get the subset to show -- to be able to
6 show why you need it and how it would be used or any of
7 those -- did any of those discussions take place?

8 MR. BLANCHET: Yes, and in one or more of
9 the letters that we've exchanged over the course of the
10 last year, we cited for them the -- I think it's an EPA
11 document that I believe is in our letter as well, that
12 the forensic tool for evaluating environmental
13 contamination that makes this fingerprinting point.
14 Plaintiffs are a sophisticated party. They understand
15 how this is done. They understand the significance and
16 the volume of superfund investigations that have
17 happened on Long Island.

18 Frankly, your Honor, my understanding and
19 working assumption is that it will just be easier and
20 more efficient for everyone if we just get the
21 database. That way, we don't have to go back to the
22 well. Believe me, the meet and confer --

23 THE COURT: No pun intended.

24 MR. BLANCHET: Right, exactly, exactly. I
25 think I can speak for a lot of the defense counsel when

1 I say we have no desire to have a scrap of paper or a
2 bit of information that we don't need. We have -- the
3 volume isn't the problem, it's the substance of it. If
4 we can get access to it in a comprehensive way that is
5 efficient, then our experts and consultants can work
6 with it in the same way that plaintiffs' experts and
7 consultants can work with it.

8 It's not a novel request. It happens a lot
9 in these types of cases. The difficulty here is, it's
10 hard to pin down a subset or a time period because of
11 the scope of plaintiffs' claims. It's 70 years and,
12 for Suffolk County, 340-plus wells, each of them with a
13 different, what they call a capture zone, that is the
14 space within which the well itself draws water. That
15 capture zone will be influenced by various factors, and
16 in some cases, it may be connected to a known superfund
17 site with a known profile of contaminants. In other
18 cases, it won't. And because there are so many wells,
19 it is more efficient if we just get all the data at
20 once.

21 Again, if there are technical issues, we're
22 happy to -- and we suggested this early on in the case.
23 We're happy to have technical people talk to each other
24 on the phone and work through those issues. Our goal
25 here is just to get the information efficiently and in

1 a manner that is fair and allows our consultants to
2 manipulate it and get what they need without creating a
3 separate dispute or having to go back to plaintiffs
4 each time.

5 THE COURT: One of the things you mentioned
6 when you talked about the scope of the claims is the
7 time period. Do you even know -- for the electronic
8 database, do you even know what the time period is,
9 what testing results are captured electronically?

10 MR. BLANCHET: We don't have full visibility
11 into that. Plaintiffs have that information. It may
12 be the case that it's for a truncated time period.
13 That's fine. I mean, I think part of the issue is,
14 we've been having trouble getting straight, clear
15 responses from plaintiffs. We're not asking them to
16 create anything that doesn't exist and we're trying to
17 avoid creating any burden or certainly any kind of
18 delay in this.

19 But we know that they have a system and the
20 various reports that they have produced, including
21 these annual reports, those are ad hoc and they're
22 driven by specific regulations and specific reporting
23 requirements. They're not really what the consultants
24 in this case need to be able to drill -- another pun --
25 drill down on each well and understand, where did the

1 contaminants in this well, where did the dioxane in
2 this well come from, so we can understand it and then
3 identify what one -- did it come from a product of one
4 of the defendants in this case because if it didn't,
5 that's obviously a big part of the defense here.

6 If it came from a third party who is a known
7 polluter on Long Island, who is already subject to a
8 consent decree that requires them to clean up the mess
9 that they made or is subject to -- been cited for
10 environmental violations in the past. That is
11 obviously a relevant fact because if they are warned
12 not to put a contaminant in the ground and they do it
13 anyway, then the liability if any that exists likely
14 rests with them rather than with any of the defendants.

15 Again, this is the whole basis for CERCLA
16 and state superfund laws, to identify the specific
17 source, the PRP, the potentially responsible party, so
18 that they can take responsibility and participate in or
19 take ownership of the cleanup. We've skipped that
20 here. Plaintiffs have gone to a very narrow subset of
21 parties that produced and sold a product containing
22 dioxane, named them, and as we understand it, they're
23 claiming that each of the defendants in this case,
24 their dioxane exists in each of 600-plus wells. We
25 want to test that. We don't believe that's true. But

1 the way to test that is a fact-intensive investigation
2 that's done all the time, but the complication here is,
3 there are so many wells that there's a lot of data that
4 needs to be processed and a lot of information that
5 needs to be gathered and sifted through to make those
6 determinations. Also, your Honor, we have deadlines
7 that we'd like to meet but this is part of making that
8 determination of who the third parties may be who we
9 may want to join to the case.

10 THE COURT: As I understand the plaintiffs'
11 burdensome argument, they say that some of the data is
12 archived. Presumably, if we're talking about archived
13 data, it is much more difficult to retrieve. I think
14 plaintiffs said it's accessible only -- not to the
15 plaintiffs but to IT specialists. Are the defendants
16 prepared to shoulder the costs of whatever it takes to
17 obtain the databases that you're looking for?

18 MR. BLANCHET: That's a good question, your
19 Honor. I don't want to give an absolute answer but
20 certainly I think if the costs are reasonable and we
21 make the determination that the information that we
22 want is worth it, then I suspect that the defendants
23 would come together on that and agree to shoulder the
24 burden of any costs. But I think it starts with the
25 principal that if it exists, then we should have the

1 technical people talk about the best way that we can
2 have access to it in an efficient way. And if there
3 are costs involved, certainly we would not draw a line
4 in the sand and say we wouldn't shoulder those costs.

5 THE COURT: Well, I can appreciate that you
6 don't want to sign on to have to pay costs that are
7 objectively unreasonable. On the other hand, you just
8 make some comment to if it's data that you -- I forget
9 the exact words that you used --

10 MR. BLANCHET: Right.

11 THE COURT: -- if you need the information.
12 You're trying to convince the Court that you do need it
13 so what information do you possibly not need? Are you
14 saying that you would be satisfied with a subset, and I
15 will certainly ask plaintiffs what data are archived,
16 starting from what period of time. When does the
17 accessible database start? Do you want to respond to
18 that and to your suggestion that maybe it wouldn't be
19 worth the cost?

20 MR. BLANCHET: The problem here is I'm a
21 little bit blind as to what's archived and the costs
22 involved in that. At some point, the expense and the
23 trouble will outweigh the usefulness. But because I
24 don't know what it is and I don't know what the expense
25 and trouble is, and I haven't had the benefit of

1 conferring with the other defendants or my client, I
2 don't want to get too far out on a limb. But as a
3 principal, I would recommend to our group and to the
4 client that we pay for reasonable costs associated with
5 getting whatever testing data they have for the wells
6 at issue.

7 THE COURT: All right, you said you didn't
8 have the opportunity to discuss this with plaintiffs.
9 I assume plaintiffs will say you had the opportunity
10 but you didn't avail yourselves of it. Now we're all
11 together and you may have to get together in the future
12 and really meet and confer, but let me hear the
13 plaintiffs' response.

14 MS. BIEHL: Sure, your Honor. For the
15 record, this is Stephanie Biehl again.

16 THE COURT: Thank you.

17 MS. BIEHL: I want to start by taking us
18 back a step, which is the burden question your Honor
19 asked about, which is always in the proportionality
20 context, which always depends on the relevance of the
21 discovery requested. Mr. Blanchet said a lot of things
22 in the past 15, 20 minutes but what I didn't hear, say
23 for one example of benzene thrown off the cuff, was any
24 potentially related contaminant that shows how dioxane
25 would move or how it would be in the aquifer or how any

1 of the other related contaminants that were agreed to
2 would move in the aquifer.

3 That's important because the
4 "fingerprinting" description that Mr. Blanchet gave was
5 not exactly accurate. Of course, I don't know any of
6 his experts yet in the case but I find it very hard to
7 believe one of his experts would say e.coli, for
8 instance, is indicative of dioxane contamination and
9 how dioxane moves throughout the aquifer and gets to a
10 well. Honestly, the same thing would be with benzene.
11 The way a benzene plume moves throughout the aquifer is
12 entirely different than how one for dioxane and TCA and
13 the related breakdown products would move. That is why
14 all contaminant history for Suffolk County Water
15 Authority has no relevance to this case.

16 Taking the burden part, I do want to step
17 back and remind -- I believe this was explicit in our
18 letter but it's not technologically feasible to just
19 copy the database as Mr. Blanchet and defendants would
20 like. The reason for that and the best analogy I can
21 give is that the database lives as a sort of Google, if
22 you will. It's searchable, you can input data on the
23 back end. It lives in the background and when you type
24 things in, you run queries, something pops up on your
25 screen that is specific to what you want. You can't

1 technically copy Google so that it's usable for someone
2 else. That is the same truth for the current database
3 that Suffolk County Water uses. And the answer to your
4 Honor's question about the time span, your Honor, is
5 that data is queryable on multiple systems back to
6 2000. Several systems are archived other than the
7 current version that Suffolk County Water uses.

8 And then finally, in response to your last
9 question about whether the defendants have responded to
10 our request to run reports for specific contaminants
11 like benzene, if they want benzene reports, we can run
12 that. We've offered that but they've never identified
13 one let alone a group of specific contaminants that
14 they or their experts wants. That offer remains open.
15 Reports are able to be run. They're incredibly
16 burdensome on their own. I'm sure you saw that just
17 the five contaminants that we've run already was
18 hundreds of thousands of lines of data and crashed the
19 system, but that's a burden that, compared to the
20 relevance of certain contaminants, we're willing to
21 take again for Suffolk County Water Authority if the
22 defendants can identify a subset of contaminants.

23 MR. BLANCHET: Your Honor?

24 THE COURT: Go ahead.

25 MR. BLANCHET: This is Mr. Blanchet. I

1 mean, this is it seems to me something that technical
2 people who are familiar with the database ought to be
3 able to get on the phone, work it out, and we can come
4 to a decision relatively quickly. As I said, we're not
5 interested in information that's irrelevant or
6 prohibitively difficult to get at.

7 At the same time, we need more than we have
8 and we don't want to have to go to plaintiffs every
9 time or consultants come to us and say, we need this
10 specific information for this well during this time
11 period because there's a drag in that where we get to
12 plaintiffs and they will get back to us when they get
13 back to us, and it just won't proceed efficiently or
14 effectively. So it seems to me that the most prudent
15 thing to do is for the Court to instruct us for our
16 technical people to confer as soon as possible, early
17 next week, get to the bottom of this, and then we can
18 report back to the Court on what protocol or decision
19 we've come to.

20 THE COURT: In terms of the database being
21 queryable -- I'm not sure if that's an actual word but
22 Ms. Biehl used it so I'll repeat it, and if it isn't a
23 word, it ought to be. So if you could get information
24 -- a queryable database back to 2000, would that be
25 sufficient?

1 MR. BLANCHET: It's a bit of the art of the
2 possible. We'll take what we can get in an efficient
3 and reasonable way. If it goes back to '98, all the
4 better. If it's only available to 2007, then we get
5 what we can get. Again, we're not trying to create
6 complications here. We're trying to make it easier on
7 everybody by having an efficient exchange of
8 information where everybody is working with the same
9 data.

10 THE COURT: Do you have anything you want to
11 say in response to Ms. Biehl's argument that the
12 database is not -- can't simply be copied and exported?

13 MR. BLANCHET: Well, we don't have the
14 database so I cannot comment on that other than, they
15 haven't provided any sort of evidence other than
16 statements in letters, nothing from a technical person
17 that explains why that may be the case. It's different
18 than my understanding from speaking to consultants but,
19 again, I think it's just a matter of getting technical
20 people on the line and figuring it out.

21 THE COURT: Ms. Biehl, when you said the
22 database is queryable back to 2000, that assumes that
23 you're not going back to archived data?

24 MS. BIEHL: That's correct, your Honor.

25 THE COURT: Mr. Blanchet is certainly

1 correct that the plaintiffs really have made no
2 showing, no evidentiary showing with respect to the
3 burden. When I read your responsive letter, in which
4 you said it would be unduly burdensome to produce the
5 database that defendants are requesting, there were two
6 cites. They were simply counsel's previous letters and
7 it's simply counsel's representation that it would be
8 unduly burdensome, but I don't think at this point,
9 you've made the necessary showing.

10 And while one can imagine that having access
11 to the database would include contaminants that are not
12 relevant, that doesn't mean that the database is
13 irrelevant. I think Mr. Blanchet has made a sufficient
14 showing that the defendants need this information in
15 order to be able to pursue their defenses. I
16 understand the plaintiffs disagree with the theory of
17 the defense but they have consultants who need the
18 information in order to pursue certain defenses. And
19 to the extent that that information is accessible, it
20 ought to be produced.

21 So I think -- at this point in time, I'm not
22 going to make a ruling with respect to the scope. I do
23 think that experts should be talking and not just the
24 attorneys. The attorneys should certainly participate
25 but I think that those with the technological expertise

1 should be a party to those discussions so that you can
2 talk about what's feasible, what costs are involved. I
3 don't think -- if it is feasible to copy the database
4 but it's very costly, then I think the defendants
5 should make a determination as to whether or not the
6 information is worth it to them.

7 Perhaps with the assistance of the experts,
8 there's a way to narrow down what the defendants are
9 looking for but I don't think that it's a sufficient
10 answer to say to the defendants, well, anytime you want
11 a test run on a particular well, when we're talking
12 about hundreds of wells, you tell us what contaminants
13 you want run and we'll produce it. That is not an
14 efficient use of anyone's resources. So I'm going to
15 direct the parties and their experts, technological
16 experts to meet and confer. I'd like a statute report
17 a week from today.

18 MR. BLANCHET: Thank you, your Honor.

19 THE COURT: All right. The next issue
20 concerns the defendants' demand for electronic
21 groundwater models. They also seek distribution
22 models. Let's first address the groundwater models.
23 The plaintiffs respond that most plaintiffs do not have
24 groundwater models, that the only ones who do, again,
25 are Suffolk County Water Authority or at least its

1 third-party consultant, CDM Smith, and that three other
2 plaintiffs, specifically Hicksville, Garden City, and
3 Bethpage, have limited groundwater models in the
4 possession of third party H2M.

5 So let me just confirm that we're only
6 talking about those three plaintiffs. Is that correct,
7 Mr. Blanchet?

8 MR. BLANCHET: That's my understanding and I
9 have no reason at this point to question plaintiffs'
10 representation about what exists.

11 THE COURT: All right. The plaintiffs
12 allege that third party CDM Smith has already produced
13 a groundwater model for the SCWA. So my question to
14 Mr. Blanchet is, do you agree with that and if so, why
15 do you need the model produced by SCWA. And if it's an
16 issue of authenticity, would a stipulation regarding
17 the third-party model moot this issue with respect to
18 SCWA?

19 MR. BLANCHET: Yes, it would moot the issue.
20 Again, here, this is -- this is to me a relatively
21 straightforward issue that I think could be resolved
22 quickly. We don't have a full understanding of the
23 models that exist that we don't have. We understand
24 that these models are fairly easy to copy and are
25 commonly produced in these cases. They're relevant

1 because they determine for specific wells where the
2 groundwater flows and where it came from, and so we'd
3 like a copy of them.

4 THE COURT: Well, I wasn't asking you to
5 address relevance.

6 MR. BLANCHET: Okay.

7 THE COURT: We have a number of issues to
8 address and I have specific questions for both sides.
9 You've said that a stipulation on authenticity would
10 resolve the issue as to SCWA.

11 So let me ask the plaintiffs, can we resolve
12 this issue? Rather than having SCWA have to reproduce
13 this, is there any issue about authenticity?

14 MS. BIEHL: I don't think so, your Honor.
15 The model that CDM Smith produced is the exact same
16 product that Suffolk County Water Authority uses. So
17 if CDM Smith needs to verify the authenticity of that
18 model, that's fine. I will say that there is a far
19 more recent, publicly available model prepared by the
20 USGS and that is, again, publicly available. The CDM
21 Smith model I believe was in 2003 was the last update
22 to that model. So I think this issue can be resolved
23 if the defendants go and get the publicly available
24 model, which applies to all of Long Island, not just
25 Suffolk County Water.

1 THE COURT: And you say that's a publicly
2 available model that was generated by what agency?

3 MS. BIEHL: The U.S. Geological Survey.

4 THE COURT: And you said it applies to all
5 of Long Island?

6 MS. BIEHL: Yes.

7 THE COURT: And when was that generated?

8 MS. BIEHL: I think in December, your Honor,
9 of 2020, sometime around there.

10 THE COURT: This is -- if all of this is
11 true, this is an issue that rather than the parties
12 digging in their heels, if they had talked with one
13 another, they would not have had to burden the Court by
14 presenting it to the Court for resolution.

15 Mr. Blanchet, do you want to respond to the
16 -- to the claim that there's an even more recent model
17 and it's available for all of Long Island?

18 MR. BLANCHET: That is true. It was
19 published in November of 2020 but it does not address
20 the reason why we want the existing model. It doesn't
21 obviate our request for the models that reside with the
22 plaintiffs.

23 THE COURT: Because?

24 MR. BLANCHET: Because one of the issues
25 that will be in this case is the decisions that were

1 made about where to place some of the wells. Some of
2 the wells that are at issue, the 600-plus wells, were
3 drilled in 2019, and those required well permits and
4 investigations, which likely include modeling. So the
5 question is -- some of these wells were drilled into
6 areas that contain dioxane. On what basis did the
7 plaintiffs make these decisions? If they had a model
8 available to them and they were using it, what did that
9 model tell them?

10 The other factor is, to the extent that the
11 modeling comes down to a need to insert/input
12 assumptions about certain things, groundwater flow.
13 The assumptions that the plaintiff has made in the past
14 may be very relevant to the assumptions they make now,
15 the assumptions in the normal course of business, non-
16 litigation, versus where we are now, where they're
17 plaintiffs in a lawsuit.

18 THE COURT: Well, what you're suggesting is
19 that the reason that you want the groundwater model
20 from SCWA is not simply for authenticity purposes but
21 to be able to prove that SCWA had access to that model.

22 MR. BLANCHET: That's correct. We don't
23 have full visibility, we don't have an itemized list
24 from plaintiffs about what models they have. I don't
25 know if they have that but if we already have the

1 model, then obviously -- maybe not obviously but yes, a
2 stipulation would suffice. If there are models that
3 they have that they haven't produced, those are the
4 ones that we want to see.

5 THE COURT: All right. Ms. Biehl, you've
6 indicated that the defendants have a groundwater model
7 that they've obtained from CDM, so what if any models
8 has your client, SCWA, had access to?

9 MS. BIEHL: No other models, your Honor.
10 Suffolk County Water Authority uses the CDM Smith model
11 that has already been produced.

12 MR. BLANCHET: Just so I'm clear, your
13 Honor, if the representation is that all the models
14 that they have within their possession, custody, and
15 control have been produced, that's the first I've heard
16 about it. But if that's the representation, then I
17 think we're done.

18 THE COURT: Well, I hope so. So if you want
19 to put that in writing, you can, but SCWA is not
20 claiming to have had access to any other models, at
21 least not before the publication of the U.S. Geological
22 Survey model. So just reduce that to writing.

23 We have three other plaintiffs who -- they
24 have limited groundwater models that are in the
25 possession of third party H2M. The plaintiffs claim

1 that those models are irrelevant because they weren't
2 created in order to model one for dioxane contamination
3 movement and that they would be unduly burdensome to
4 produce. In particular, with respect to the issue of
5 burden, the argument is that special software is
6 required. However, there is no form statement from any
7 expert about what would be entailed in producing the
8 requested models.

9 Mr. Blanchet, do you want to address the
10 relevance issue?

11 MR. BLANCHET: Yes. The relevance issue is
12 -- and this is a unique fact about the need for
13 information. Dioxane is missable in groundwater. What
14 that means is, there's other contaminants that will
15 stick to soil, so they will not move at the same pace
16 or with the water. The water will pass through them.
17 Some of the contaminants will be picked up by the water
18 and move on while the main body of contaminants stays
19 in a plume attached to the soil.

20 Dioxane, as plaintiffs allege in their
21 complaint, is missable, so it travels with the
22 groundwater at the same speed, in the same direction,
23 through the same pathways. So in a very real respect,
24 any model that models the groundwater on Long Island in
25 or near the wells that we're talking about will tell us

1 how the dioxane moves as well. That's the reason for
2 the request. If it didn't have anything to do with
3 dioxane, we wouldn't want it. Again, we're not trying
4 to collect information that's irrelevant.

5 THE COURT: All right, I'll hear from Ms.
6 Biehl in response.

7 MS. BIEHL: Yes, your Honor. These models,
8 which are in H2M, the third-party engineer's
9 possession, are also duplicative of what's available in
10 the CDM Smith model that has been produced. The CDM
11 Smith model is Long Island-wide so it covers the
12 groundwater of the entirety of Long Island. That
13 includes the Hicksville water district model, the
14 Garden City water district model, and the Bethpage
15 model.

16 So I'll stop there and say, I think that
17 solves the issue, which is if the defendants review the
18 CDM Smith model, they will get exactly what they would
19 get, we presume, from the other models. But we don't
20 even know for sure because what H2M has told us is that
21 these are either inaccessible, they haven't been able
22 to find these models, or they're archived. That is why
23 the burden is also undue to produce those models in
24 light of the fact that the CDM Smith model has already
25 been produced.

1 THE COURT: Well, did H2M create the model
2 from the CDM Smith model? In other words, did they
3 just take a portion of that model and use it as their
4 own, or did they generate their own model?

5 MS. BIEHL: Your Honor, we don't know that
6 and H2M doesn't know that either at this point. We
7 have asked that question and are continuing to dig and
8 try to find the people who actually worked on these
9 models, and those people are just not there anymore or
10 they don't know.

11 THE COURT: When did H2M first either create
12 form whole cloth or from the CDM Smith model the model
13 that it had at some point?

14 MS. BIEHL: The models relevant here and
15 cited in the letter are dated 2004 and 2007.

16 THE COURT: And if I recall correctly, the
17 CDM Smith one was from 2004?

18 MS. BIEHL: I believe 2003, your Honor.

19 THE COURT: 2003.

20 Let me ask Mr. Blanchet, are you -- is this
21 different from your discussion about the groundwater
22 models? This is not an issue of what the plaintiffs
23 knew and when they knew it but actually, you want to
24 know how the moves, you know, so the relevance isn't
25 what the plaintiffs had access to.

1 MR. BLANCHET: I believe it's more of the
2 former but I hate to draw a hard line without seeing
3 it. But certainly what they knew it is a reason we
4 would want to see it.

5 THE COURT: Well, it sounds like we don't
6 even know -- let's say that H2M has these models but
7 they never shared them with the -- I guess it's the
8 three plaintiffs. They had them so they provided --
9 they used them and they would provide some reports that
10 they may have taken into account, what the models
11 showed, but the plaintiffs never had access to them.

12 MR. BLANCHET: If they never had access to
13 them and no decisions were made based on them, then
14 they may not be relevant at all. It's just early and
15 difficult to tell given what the claims are and what we
16 know. We haven't seen it, we don't know what it says,
17 so it's difficult for me to opine on that now. But it
18 could be the case that we see it and it's not relevant,
19 certainly.

20 THE COURT: Well, and it may be that you
21 don't have to see it to determine that it's not
22 relevant. If you have other information that the
23 plaintiffs never had access to it -- let's assume that
24 H2M can't locate it now and they can't locate the
25 individuals who created it. You have the CDM Smith

1 model and there's nothing to suggest that these three
2 plaintiffs, Hicksville, Garden City, and Bethpage, had
3 access to it. Don't you have everything you need then?

4 MR. BLANCHET: That may be the case and I'm
5 happy -- the thing I think we're trying to balance here
6 is, we're happy to defer this until after we take the
7 deposition, a 30(b)(6) deposition of H2M or the
8 plaintiffs so that we can get more visibility into
9 that. But I'd hate to be in a position where it
10 becomes very clear very quickly that it is relevant and
11 it should have been produced a long time ago. I want
12 to avoid that. But if plaintiffs believe that it is
13 relevant -- is irrelevant or duplicative and the burden
14 is such that it would take a lot to just give us a
15 copy, then we'll defer it until the deposition process.

16 THE COURT: The Court has been provided with
17 insufficient information at this point to make a ruling
18 on this but the parties really ought to confer with one
19 another and with their respective experts. H2M -- I'm
20 not sure what it means. On the one hand, plaintiffs'
21 counsel is now suggesting that they don't -- they can't
22 find this information. On the other hand, in the
23 letter, there was a suggestion that special software is
24 required. Again, there was no sworn statement from an
25 expert on that so I am not going to rule on this at

1 this time. I'm going to deny the application without
2 prejudice but the parties really ought to do some
3 serious discussions about the need for it, whether it's
4 necessary, and finding out the factual predicates.

5 Another issue that the defendants have
6 raised is their demand for a drinking water
7 distribution model. The plaintiffs contend that this
8 requires licensed software, and they also point to the
9 fact that they've already produced distribution of
10 surface-area maps as well as well-by-well pumpage
11 histories.

12 So one question I have for plaintiffs'
13 counsel is, what's the difference between a map and a
14 model? Is there a difference?

15 MS. BIEHL: There is a difference, your
16 Honor. A map is more of a typical "document," which
17 shows you where the distribution zone goes for each
18 particular plaintiff and where the surface area is for
19 each particular plaintiff. A model only does one thing
20 in a very limited sense. You think of it like an
21 illustration, a live illustration and based on only
22 single point in time. You can't look back, you can't
23 look forward. It tells you based on what my water
24 system is pumping right now, where's my water going
25 right now at this point in time.

1 Distribution models are sometimes -- one
2 example it's used for is, if there's a fire happening
3 somewhere in plaintiffs' service area, someone is going
4 to want to look and say, how much water do I have
5 pumping to get to those fire hydrants in the vicinity
6 of the fire. The model itself does not show what
7 defendants think and want it to, frankly, which is when
8 Bob Smith watered his lawn in 1991 for 45 minutes and
9 where that water might have gone. That's not a thing
10 that the distribution model can ever do, ever did, and
11 does today.

12 THE COURT: So you say it's a snapshot at a
13 particular point in time?

14 MS. BIEHL: Exactly.

15 THE COURT: All right, I'll hear from
16 defense counsel, Mr. Blanchet.

17 MR. BLANCHET: Thank you, your Honor. I
18 think I have a fundamentally different perspective on
19 what the model can do. It is manipulatable. If it was
20 a snapshot, it would be a map. It can tell us what the
21 system itself is capable of. So when the water is
22 drawn from an individual well, does that water need to
23 go to neighborhood A or to neighborhood B? The model
24 can be used to determine, if you shut off well A, can
25 you draw enough drinking water from the other wells so

1 that you're not drawing from a well that has dioxane in
2 it. You don't need that well.

3 That's my understanding of the model. It is
4 manipulatable, it has data in it, and you can do runs
5 of the model, determine what the system itself is
6 capable of. It also provides more details about the
7 mapping of where the various -- I think it's like 6,000
8 miles of pipes in the Suffolk County system, where the
9 water that they draw out of the ground goes to and
10 where it could go to.

11 Again, this falls into the same category, I
12 think, as the database. It's the art of the possible.
13 We understand that it exists electronically. There
14 ought to be a technical way to share it. We're not
15 looking to create make work, but it would be useful for
16 our investigation to be able to have the same access to
17 it that plaintiffs have.

18 THE COURT: Well, I'm not sure that it's the
19 same as the testing database because the testing
20 database, as I understand it, is a repository of data
21 inputted over time. I don't know whether the model,
22 whether that's something that -- I don't know whether
23 you can go back in time with that. Are you suggesting
24 that you can?

25 MR. BLANCHET: Well, I think it depends on

1 what we're focusing on. As I understand it, you could
2 take the model and say, in January of 2020, we took
3 this amount of water from well A and sent it to these
4 customers. The model would tell you if you could have,
5 instead of that, shut down well A and still provided
6 products for those customers.

7 It's a big issue in the case because one of
8 the issues that plaintiffs have claimed is that these
9 million-dollar AOP systems need to be attached to every
10 well with dioxane in it and a question is, what if you
11 just shut down the well or blend the water from
12 different wells so that the concentration of a dioxane
13 is at a sufficiently low level that an AOP system isn't
14 necessary?

15 My understanding of it is that the model
16 will tell you whether you can do that, what is possible
17 and it shouldn't be, because it exists in electronic
18 form, a difficult task to get us access to it. There
19 may be technical challenges. Again, we're happy to
20 work through those.

21 THE COURT: Ms. Biehl, anything you want to
22 add?

23 MS. BIEHL: Yes, your Honor, just to clarify
24 that Mr. Blanchet is talking about a hypothetical
25 model. Suffolk County Water Authority's model does not

1 go back in time, cannot go back in time. That would be
2 an entire recalibration of the model, which is a brand
3 new model. The possibility and the speculation of the
4 future looking is also something that Suffolk County
5 Water Authority does not use the model for, so that
6 would again require recalibration of the model.

7 THE COURT: Well, you're talking about
8 Suffolk County and I'm not certain -- I want to look at
9 what the parties had to say about -- there's very
10 little on this issue at all so I'm not sure which
11 plaintiffs we're even focusing on other than Suffolk
12 County. Are we talking just about Suffolk County?

13 MS. BIEHL: Your Honor, the other plaintiffs
14 that have distribution models are approximately the
15 same, except for the fact that their third-party
16 engineers are the ones who maintain the models.

17 THE COURT: So all the other plaintiffs have
18 third-party engineers and they have the same kinds of
19 distribution models?

20 MS. BIEHL: The vast majority do. I do not
21 believe all plaintiffs have distribution models,
22 meaning that H2M for instance may have a client that
23 does not have a distribution model built by H2M or used
24 by H2M I should say. I think that's a small number but
25 not all plaintiffs have distribution models based on

1 the information we have today.

2 THE COURT: Again, the parties are really
3 talking at cross-purposes to one another because I
4 don't even think there's an understanding of what these
5 models are, what they can capture. If they do not
6 capture what the defendants are seeking, then it would
7 seem that that's the end of the matter. But I really
8 think that there has to be a further discussion between
9 counsel and between those who are familiar with this
10 data.

11 And in particular, if there's licensed
12 software, what would be involved -- if the defendants
13 determine that this information, they do want it, and
14 if the plaintiffs are not going to agree to produce it,
15 assuming that the defendants bear the costs, then you
16 need to work out the logistics of how that information
17 would be provided to defendants and they would have to
18 pay for it.

19 MR. BLANCHET: That's sensible to me, your
20 Honor. I can say with some confidence that for these
21 distribution models, the defendants would pay for
22 whatever software would be needed to run them if their
23 consultants don't already have it.

24 THE COURT: All right. The next topic is
25 investigatory documents. I want to cut through the

1 issue about sources and what's a source. As I
2 understand it, the plaintiffs' claim that they have
3 produced all documents that reflect investigations of
4 potential sources, whether intermediary sources or
5 ultimate sources, direct sources, but they have
6 produced all documents that reflect investigations
7 concerning dioxane.

8 Is that an accurate statement of the
9 plaintiffs' position in this case?

10 MS. BIEHL: Yes, your Honor, subject to the
11 ongoing privilege review and supplemental collections,
12 we have produced all documents that we understand the
13 defendants want, "investigatory documents." Those
14 categories are listed in the letter and I will not
15 repeat them unless your Honor wants me to.

16 THE COURT: And the defendants, they
17 complain that -- one moment. They complain that
18 plaintiffs have produced few reports in which they're
19 discharging their regulatory obligations. As I
20 understand the plaintiffs' position, they're not being
21 asked to produce all reports that they have an
22 obligation to create but only those that are responsive
23 to the relevant demand, which concerns potential
24 sources of dioxane.

25 Is that accurate summary of the plaintiffs'

1 position, Ms. Biehl?

2 MS. BIEHL: I believe almost, your Honor,
3 which is that, obviously, we disagree with the
4 defendants' mischaracterization of the regulations.
5 But we have produced documents that show investigation
6 sources, potential sources, capture zones, you name it,
7 for all of the wells if the plaintiffs' have it,
8 regardless of if it is dioxane. We did originally
9 object on that ground because this is a dioxane case
10 after all, but the well radius reports are specific to
11 a well and not a specific contaminant, for instance.

12 THE COURT: All right. Mr. Blanchet?

13 MR. BLANCHET: Yeah. This is very simple.
14 The problem here is the caveat in their letter, subject
15 to privilege review and ongoing privilege review and
16 supplemental collections. Our concern is, all of this
17 material was supposed to be produced on March 31st. We
18 have a deadline for identifying third parties. Our
19 concern is that given the paucity of the investigative
20 reports that have been produced, it's surprising to us,
21 and the concern is we're going to find out later that
22 there's a whole bunch of other documents that the
23 plaintiffs are going to characterize as part of their
24 supplemental collections.

25 We received four million documents right

1 before the deadline. Plaintiffs have indicated that --
2 there are 27 plaintiffs and we're in Covid, and they're
3 having some struggles getting documents. What does
4 supplemental collections mean and what's going to be in
5 those documents?

6 THE COURT: Ms. Biehl?

7 MS. BIEHL: Sure, your Honor. A couple of
8 corrections: We produced close to one million
9 documents in this case, over 5.5 million pages,
10 approximately. All of the documents -- excuse me. All
11 of the information that the defendants are looking for
12 in these investigatory documents has long since been
13 produced. The supplemental period in which we are
14 collecting is roughly the past year of Covid for most
15 of the clients for which we could not for instance
16 enhance our email collections. The email collections
17 and productions that have been produced to date span
18 over 20 years for the plaintiffs. The dates of the
19 documents that have been produced span 90 years.

20 Mr. Blanchet is concocting a concern that is
21 just not one. Supplemental collections are typical of
22 every case and every massive case where documents
23 continue to be created that are relevant as the
24 litigation goes on. Privilege review is ongoing. The
25 defendants have known about that for months. They've

1 known what substantial completion means for us, and the
2 surprise is surprising to us. All that said, the
3 supplemental and the privilege production, we have no
4 reason to believe it will be but a fraction of what has
5 been produced to date.

6 If there are ways that the defendants want
7 to talk about prioritization of certain plaintiffs and
8 certain types of documents, we have offered that to the
9 defendants repeatedly and we have not received a
10 response in terms of privilege review and supplemental
11 collections, and we on our own are prioritizing based
12 on responsiveness and in light of the party depositions
13 to start in December, ways to streamline what we think
14 are the biggest, most responsive categories of what's
15 "stuck in the privilege cue."

16 THE COURT: Let me just clarify because
17 March 31st, it was not the date to complete party
18 document discovery, it was substantial completion. But
19 that now was nearly two months ago and I understand you
20 have -- there will be a supplemental production for
21 more recent documents. Are you still undertaking a
22 privilege review of documents that were produced to
23 plaintiffs' counsel before the March 31st substantial
24 completion deadline?

25 MS. BIEHL: Yes, your Honor.

1 THE COURT: And I understand that you have
2 an issue with the defendants' production and I'll put
3 them on notice as well, but that issue is not currently
4 before me. But we can't just have this drag out and
5 drag on indefinitely and then in the middle of the
6 summer, the Court is going to be presented with
7 privilege disputes that I'm expected to resolve in
8 August so you can start your depositions in September.
9 That is not an acceptable way to proceed.

10 So how much time do you need to complete
11 your privilege review and the review of the
12 supplemental collection?

13 MS. BIEHL: Your Honor, the answer is we're
14 going as fast as we can with as much resources as we
15 have right now. I will say that we don't even have a
16 privilege log protocol in this case. This is a request
17 the plaintiffs have made of the defendants numerous
18 times and we only just got a conferral on calendar for
19 next week, and I believe some of these issues and ways
20 to streamline the privilege review can be discussed
21 then with the defendants and would be worth the
22 parties' time.

23 I would imagine a couple of months to
24 complete the supplemental collection and review. We
25 have to go out to Long Island or some of us have to

1 trek across the water to Long Island to collect some of
2 those for plaintiffs that do not allow remote
3 collections or do not have the technical capability to
4 do remote collections. But like I said, the volume of
5 documents that will be produced in those supplemental
6 collections is small compared to what we've already
7 produced to date of close to a million documents.

8 We certainly can guarantee that we will be
9 done with the privilege review and supplemental
10 collection review by the time fact discovery cutoff for
11 a particular case comes up, for instance Suffolk County
12 Water Authority, and certainly by the time the
13 plaintiffs' depositions commence in September is our
14 current goal for those who do not have a fact discovery
15 cutoff.

16 THE COURT: Well, again, as I said, I don't
17 think that's an adequate response because if you're
18 saying that you will produce your privilege log at the
19 end of August and depositions are starting in
20 September, and perhaps there are going to be disputes
21 over what's included and whether or not depositions
22 should be stayed while those issues are being presented
23 to the Court. This is not my only case. I'm not here
24 on retainer. I literally have hundreds of cases. So
25 it's not sufficient to say it will be done before the

1 depositions start.

2 It also isn't sufficient to say that you'll
3 produce the results of the supplemental collection in
4 the next couple of months, that this will be much
5 smaller than the prior production. Much smaller could
6 be 2,000 documents. So what are we talking about in
7 terms -- what is your reasonable expectation of the
8 number of documents that we're talking about?

9 MS. BIEHL: For review and supplemental
10 collection, my estimate here today, your Honor, across
11 all of the plaintiffs that I represent is a few hundred
12 thousand documents for review, not production. Again,
13 the search terms in this case were incredibly broad so
14 it requires us to review a lot more documents than are
15 actually responsive. So I don't know how many we'll
16 end up producing but it will certainly be an incredibly
17 small percentage of what we produce today.

18 THE COURT: Well, I think one of the other
19 issues that should be addressed next week when you talk
20 about -- when you have your meet and confer on coming
21 up with a privilege log protocol is coming up with
22 interim deadlines for productions both by plaintiffs
23 and defendants so that we're not in a situation where
24 we have these last-minute productions and disputes that
25 are presented to the Court.

1 MS. BIEHL: Yes, your Honor.

2 THE COURT: So with respect to the
3 investigatory documents, I don't know that there's
4 anything else to say other than that the defendants
5 have indicated that they may want to take a deposition
6 of a document custodian to verify that an adequate
7 search was conducted. The defendants are free to do
8 that but there are deposition limits in place in terms
9 of the number of depositions, and any such depositions
10 will count towards the deposition limit.

11 MR. BLANCHET: Okay, your Honor. It's Mr.
12 Blanchet and I didn't mean to interrupt but just for
13 clarity, I think our request was based on the
14 representation from plaintiffs that they had made a
15 full production. It sounds like there's an
16 acknowledgment that a full production has not been made
17 and we're go to work together to figure out how to get
18 that done in an orderly and hopefully efficient manner.

19 The concern we have now is, we had the order
20 and the rest of the schedule in the case was built off
21 of -- the Court put in her order, built on the premise
22 that the deadlines for production would stick.
23 Obviously, everything gets backed up, and we certainly
24 don't want to be in a position where we're having
25 document dumps right before depositions and having

1 fights about that.

2 THE COURT: I agree with you but the
3 plaintiffs are complaining that they haven't gotten the
4 documents they've demanded. I don't want to spend a
5 lot of time on that but if that is the case, then you
6 know what they say about people in glass houses.

7 MR. BLANCHET: I appreciate that. I'm happy
8 to give them -- talk to them about that. It's not
9 something that they've raised with us at any time
10 recently, there's no motion, so I don't want that to
11 become a diversion. There's a concession here that
12 they haven't produced the documents. There's not a
13 clear indication of the volume or importance of those
14 documents, and we have a deadline in less than two
15 months to name third parties. That's the concern that
16 I have immediately.

17 MS. BIEHL: Your Honor, this is Stephanie
18 Biehl. I just want to correct the record here. The
19 documents have been substantially completed since the
20 deadline, which is March 31st. The investigatory
21 documents at issue in the defendants' motion, which Mr.
22 Blanchet himself says probably would have benefitted
23 from further conferral, have long since been produced.
24 Those are things that the defendants claim they need to
25 identify potential third-party defendants. They've had

1 that since November of 2019.

2 What I'm saying about the privilege review
3 with respect to investigatory documents is that it's
4 possible that there are some documents that are caught
5 in a privilege review that the defendants might deem a
6 "investigatory document" and tons and tons and tons of
7 other information that convey who the potential users
8 are of the defendants' product, the source water
9 assessment reports, the capture zone reports, the EDR
10 radius reports, those have all been long since
11 produced.

12 MR. BLANCHET: Your Honor, if I may, this is
13 the problem. It's volume over substance. What I heard
14 plaintiffs' counsel say is that they still need to make
15 a trek across the river to go in and make collections
16 of documents. So this is not a case where we have the
17 documents, it's a small group, and we need to do a
18 privilege review. In some cases, the collections
19 haven't been done yet. They're not in a position to
20 make representations about what may or may not exist.
21 They haven't even done the collection yet.

22 MS. BIEHL: That's not true, your Honor, if
23 you would like to hear from me.

24 THE COURT: I really -- I really don't want
25 to hear any more on this. I think these are

1 conversations that should have taken place among
2 counsel before this. As I understand it, these are
3 supplemental productions that we're talking about. And
4 while it may be a fraction of the million documents
5 that have been produced, there's still a substantial
6 number but my understanding is that these are the more
7 recent documents. But I'd like to move on because we
8 have other issues to address.

9 The next item on the motion to compel
10 documents is what the defendants characterize as well
11 files. The defendants complain that plaintiffs have
12 produced very few well permit applications and
13 supporting engineer reports. The plaintiffs claim that
14 they have produced well completion reports for each
15 plaintiff and will produce all permit applications that
16 are kept electronically.

17 Let me first ask, Ms. Biehl, how far back
18 are the permit applications that are kept
19 electronically?

20 MS. BIEHL: It depends on the plaintiff,
21 your Honor, but we've already produced some that date
22 back to 1933 that have been digitized, so the scope is
23 1933 to the latest well drill, which could have been
24 2019, 2020, 2021.

25 THE COURT: And why are you now saying that

1 you will produce these? Why haven't they been
2 produced?

3 MS. BIEHL: Because this is an area where we
4 share your concern, your Honor. If the defendants had
5 just called us and told us they meant water supply
6 applications when they said well files, we would have
7 produced them. Most of them we believe we have
8 produced already, and we've already started to identify
9 where digitized. They may have not been produced for
10 certain wells for certain plaintiffs. That's the
11 reason, your Honor. We didn't hear about this until
12 the motion was filed.

13 MR. BLANCHET: Your Honor, if I may?

14 THE COURT: Mr. Blanchet.

15 MR. BLANCHET: There's no confusion about
16 this. They produced some of the files, they haven't
17 produced all the files. It's likely because of the
18 resourcing issue and I wish they would just be candid
19 about that so that we can make wise decisions about
20 scheduling and prioritizing, but we get answers that
21 aren't clear. They have additional well files that
22 they still need to produce. I don't know what the
23 status of them are. They say that they're collecting
24 them and that they will produce them. We don't know
25 when.

1 We know there are hundreds of wells in play
2 that they haven't produced those documents for, and we
3 need them produced and we need to know when they're
4 going to be produced so we don't have fights about this
5 throughout the summer. If they need more time, then we
6 should discuss that and adjust the schedule
7 accordingly. But this hiding the ball and saying one
8 thing about, we've produced some or they have
9 everything they need, it's not getting us anywhere. We
10 just need specific answers, when are the files going to
11 be all collected and produced.

12 THE COURT: Have you sought them from the
13 regulators?

14 MR. BLANCHET: I believe they're part of the
15 subpoena, yeah, but it's unclear that (ui) everything
16 that the plaintiffs have.

17 THE COURT: Have you gotten a response from
18 the regulators?

19 MR. BLANCHET: Yes.

20 THE COURT: All right, that is not an excuse
21 for non-production by the plaintiffs but I wanted to
22 know because I did hear Mr. Blanchet's comment of,
23 well, we'll just adjust the schedule if they're not
24 going to produce it. That was a schedule that was
25 worked out with Judge Gershon. It is not a schedule

1 that I am about to adjust in any way.

2 MR. BLANCHET: Understood, your Honor.

3 THE COURT: So if what's going on here -- I
4 know that the defendants were extremely unhappy with
5 the schedule that was set. It was substantially
6 shorter than the five-year period that the defendants
7 were seeking. I'm not going to allow this quibbling
8 over discovery disputes to be used as a wedge to try
9 and push the schedule back.

10 So here's another area for counsel to
11 discuss next week. You're really going to have your
12 work cut out for you. We are going to keep to the
13 deadlines and if I have to set additional deadlines for
14 parties to make supplemental productions, then I will
15 do that before I will simply adjourn deadlines that
16 were set at the direction of the district court.

17 MR. BLANCHET: Thank you, your Honor.

18 THE COURT: All right. The next issue
19 concerns emails. The defendants are complaining that
20 the plaintiffs have not made a complete email
21 production. They note that there are several
22 individuals identified in their fact sheet as likely to
23 have relevant information. Their emails have not been
24 produced. They also complain about date gaps and
25 emails that third parties have produced that plaintiffs

1 have not.

2 In response, the plaintiffs note that some
3 of the custodians identified by the defendants are
4 nonparties, so that would explain why the plaintiffs
5 haven't produced their emails. They also represent
6 that they're still producing emails, which again goes
7 back to this issue of, we've got to get these documents
8 from each of the parties into the hands of opposing
9 counsel. The defendants want to be able to take
10 depositions of custodians of records. Again, you're
11 free to do that. That will count towards the number of
12 depositions.

13 Mr. Blanchet, what do you -- what is it that
14 has not been addressed?

15 MR. BLANCHET: I think it's just a matter of
16 determining when we're going to get the documents. We
17 see this statement, production will continue pursuant
18 to the Federal Rules, and our concern is that we're
19 going to get late productions or productions right
20 before depositions, and we want to avoid that. We want
21 to sort that out now and get clarity on what's been
22 produced so that we can have comfort going into these
23 depositions that we're not going to have more fights
24 later.

25 THE COURT: And I want that assurance as

1 well. And if it's a matter of resources, the
2 plaintiffs have brought very broad claims in multiple
3 cases and if it's a question of resources, you need to
4 put more resources on these cases because you wanted a
5 short discovery time frame. I shouldn't say short
6 because we're still talking about 2022 but you got the
7 schedule that you were looking for, for the most part.
8 Now you're going to have to live with it, even if it
9 means putting many more people on the case or the
10 cases.

11 All right, let's turn to the interrogatories
12 now, and if I could just -- I understand that it will
13 be -- who is going to be -- Mr. Martin, you'll be
14 speaking on behalf of the plaintiffs with respect to
15 the interrogatories?

16 MR. MARTIN: That's correct, your Honor.

17 THE COURT: And remind me who on behalf of
18 the defendants will be addressing these issues?

19 MR. BLANCHET: You'll still have me, your
20 Honor, Mr. Blanchet.

21 THE COURT: All right. The first issue that
22 -- the motion to compel interrogatories concerns two
23 interrogatories, 1A and 1B, that together asked the
24 plaintiffs to identify each source that you know,
25 that's A, or suspect, that's B, to have contributed to

1 the 14 dioxane each supply well. One of the
2 preliminary issues that has come up in connection with
3 this dispute is that the defendants claim that the
4 plaintiffs still have not identified all the wells at
5 issue.

6 In response, the plaintiffs counter that
7 they have not been asked. There was not a discovery
8 demand asking them to identify all the wells at issue.
9 I understand that some of the materials that have been
10 produced list wells that differ in number and identity
11 from report to report. The plaintiffs have indicated
12 that they will provide a list of the SCWA wells "with
13 detections."

14 So one thing I would like to clarify is, are
15 the differing numbers the result of the fact that the
16 sampling results vary over time so that there may be
17 contamination -- dioxane contamination in a well on a
18 particular date and perhaps a year later, it's not
19 shown but maybe the year after that, there is
20 contamination again. Is that what accounts for the
21 varying numbers and lists that have been produced? Mr.
22 Martin?

23 MR. MARTIN: Your Honor, it's Scott Martin.
24 I can fully understand how your Honor might infer that.
25 There seems to be an implication in the defendants'

1 letter that somehow, surreptitiously and inexplicably,
2 we dropped 78 wells from the case. No, that's not the
3 distinction here. The question is which wells are
4 contaminated and which wells are at issue for damages.
5 Mr. Blanchet and I get along famously well, probably to
6 the consternation mutually of our colleagues. If he
7 had picked up the phone and said, Scott, can you
8 clarify this for me, I would have.

9 347 wells were identified as contaminated.
10 Only 269 of those were at issue for damages, however,
11 and that's because the authority is not seeking damages
12 for monitoring wells. Those are the small-diameter
13 wells that are drilled for testing and monitoring of
14 the aquifer and they are not one to pump drinking water
15 to Long Islanders. So they're contaminated but they
16 don't count for damages, obviously. That's the
17 distinction. It's that simple. There's no complicated
18 Venn diagrams over time here.

19 THE COURT: Well, it does seem like a
20 straightforward response and I'm surprised that you say
21 you and Mr. Blanchet get along so well because this
22 really should have been an issue that you resolved by
23 talking to each other. Even if he didn't pick up the
24 phone, you could have told him that. You could have
25 said that in your response to the various discovery

1 dispute letters between counsel, in your letter to the
2 Court. This is the first time I'm hearing it. I
3 presume it's the first time Mr. Blanchet is hearing it.

4 MR. BLANCHET: That's correct, your Honor.
5 From our perspective, this is a very simple issue. We
6 need to know the wells that are contaminated, the wells
7 that are at issue, and then either yes or no for each
8 of those wells. And if it's yes, what is the source.
9 And if it's, we don't know, just say that. It's that
10 simple.

11 If you go through them, you can see there
12 are varying degrees of responsiveness. I will
13 compliment -- at the risk of getting shunned at
14 cocktail parties, I will compliment New York Water
15 Authority. They made a good-faith effort to respond to
16 the interrogatory, they supplemented it, and now it
17 really does help focus discovery. That's the type of
18 response we simply want from each of the plaintiffs.

19 THE COURT: Well, as I understand it, the
20 defendants are seeking information that's kept in the
21 ordinary course of business. As I read the plaintiffs'
22 response, this is not information they have in the
23 ordinary course of business. This is either work
24 product information that's been developed in
25 anticipation of litigation and it is going to be the

1 subject of expert discovery. So what is your response
2 to that?

3 MR. BLANCHET: Two different issues, your
4 Honor. We are not seeking their expert work. We are
5 seeking what they -- each plaintiff in the normal
6 course of business knows or suspects about each well
7 contaminated with dioxane. If they don't know the
8 source of the contamination, all they have to do is
9 identify the well and say, we don't know. If they do
10 know or suspect in the ordinary course of business,
11 just identify the source. That's it for each well.
12 That's all we'd like. Again, New York Water Authority
13 did it in a manner that's very helpful and I think
14 narrows the issues and focuses discovery and will make
15 discovery of those claims go much more smoothly. And I
16 suspect that each plaintiff can do the same. They just
17 haven't yet.

18 THE COURT: Well, the plaintiffs have cited
19 documents that have been produced. They've said that
20 under Rule 33, they've satisfied their obligation. If
21 they were to represent to the Court that all relevant,
22 non-privileged information has been produced regarding
23 the knowledge or suspicion regarding the sources and
24 cites of contamination, is that sufficient?

25 MR. BLANCHET: No, your Honor, and I'll tell

1 you why.

2 THE COURT: Why not?

3 MR. BLANCHET: Because the documents that
4 they cite -- and I've looked at them. The documents
5 that they cite pertain to some wells, and it's not as
6 if the documents say, we suspect that contamination in
7 this well came from this site. They're relevant to
8 that determination but they don't address that.

9 The bigger issue is -- and we gave them
10 credit for this in our appendix laying out -- it's only
11 a very small number of wells that are in play. But
12 what would do the trick is for the other wells that are
13 in play, if they identify those and then just tell us
14 they don't have any information about the source of the
15 contaminant in the well. That would suffice if that's
16 the answer, but what we're getting now is make-wait
17 objections and ambiguous kind of responses that are
18 all-encompassing.

19 THE COURT: Well, I'm not even going to
20 address the make-wait objections. I'm trying to get to
21 the heart of the issue here. And when you say there
22 are only a small number of wells that are in play, what
23 do you mean by that? Maybe there's something in an
24 appendix that I missed.

25 MR. BLANCHET: In appendix A to our

1 interrogatory motion, we tried to lay this out in great
2 detail, and I can walk the Court through a couple of
3 examples of exactly what we're talking about.

4 THE COURT: All right, appendix A, which my
5 recollection is, is extremely long.

6 MR. BLANCHET: I think it's --

7 THE COURT: No, I take it back. It's 7
8 pages.

9 MR. BLANCHET: 7 pages. And what we do here
10 in the column to the far left is each plaintiff, the
11 number of wells that they identified in their fact
12 sheets, and then excerpted the substantive part of
13 their interrogatory response. They all start with the
14 boiler plate kind of language and objections but some
15 of them provided some substance.

16 So for example, Albertson. They're a
17 plaintiff. They claim damages related to five wells.
18 We asked them what they know about the sources, either
19 known or suspected, and all we got was a generic,
20 boiler-plate response. For Suffolk County, which is
21 the lead plaintiff, they have identified 347 wells.
22 Mr. Martin and I can work out how that breaks out, but
23 the larger point is, they identify 14 documents.

24 The 14 documents are commercially available
25 property reports that simply identify superfund and

1 environmental sites in the vicinity of specific wells.
2 So the 14 documents and the narrative response cover 17
3 of their wells that they've put at issue, and that's
4 fine. It's good that we have that information. The
5 problem is, and the devil is in the details, is that we
6 have to defend against the remaining 330 and we don't
7 know what their position is on that. If they don't
8 know, just tell us what the wells are and say you don't
9 know. That's it.

10 As an example, if the Court looks at New
11 York American Water, if I can find it here. Yep, New
12 York American Water, where there's 25 wells at issue.
13 They did specific responses for the wells that they
14 know about. Now, we would prefer it -- I suspect that
15 they won't have a problem giving this to us but just
16 confirm for us that the other wells, the wells that you
17 haven't identified, you don't know what the source is
18 and you don't, in the normal course of business, come
19 to a conclusion or have done an analysis about what you
20 suspect the source of the contaminant in the well is.

21 It's really important to the third-party
22 issue because for some of these wells, the plaintiffs
23 will say, we know that the contamination -- the dioxane
24 in this well came from this specific, known superfund
25 site. Then the defendants as a group, we can decide

1 whether that party that was responsible for historical
2 contamination and is responsible for cleaning that up
3 should or shouldn't be brought into the case.

4 The other issue is that for some of these
5 third parties, there's already consent decrees or
6 contracts that exist and I think we attach one to our
7 exhibits, where the party has already agreed with some
8 of the water districts that they're responsible for the
9 contaminants and that they will clean it up, either at
10 the well head or at their facility. The relevance of
11 that goes without saying, but it's something that we
12 spoke to the Court about in December of 2019, I
13 believe, and it's not a lot of work. It should be a
14 straightforward yes or no and if yes, just identify the
15 site.

16 THE COURT: Mr. Martin?

17 MR. MARTIN: Your Honor, this is precisely
18 the sort of information that is appropriate for a Rule
19 33(d) response, which is what we provided. Suffolk
20 County Water Authority is not in the business of (ui)
21 local car washes, et cetera. The information that we
22 have is in the defendants' hands. When we certified
23 that to the Court on April 19th, we did not do that
24 lightly.

25 You have for example, and Ms. Biehl has

1 already address it, these EDR radius map reports,
2 environmental data resources. Those identify the
3 coordinates of a particular well, particular users,
4 TCA, suspected intermediate sources of dioxane in that
5 corresponding area, et cetera. All of it, the entirety
6 of it has been provided to the defendants.

7 We will provide them a list of the wells.
8 It's very simple and, frankly, the first indication
9 that I had was when I saw the motion to compel, that
10 there was miscommunication there or misunderstanding on
11 the part of the defendants, but we'll provide them a
12 list of the wells that are at issue. In fact, it has
13 just been updated. Not surprisingly, there are 9
14 additional wells, so rather than 269 it is 278. The
15 plumes move, and we will continue to update that as we
16 approach trial.

17 THE COURT: Well -- I apologize for using
18 that word in this case. What is your position with
19 respect to whether you're -- apart from privileged
20 information or apart from testimony and opinions that
21 will come from an expert, if your client were asked to
22 answer questions on a well-by-well basis, would your
23 client be able to answer that question?

24 MR. MARTIN: I think the client would answer
25 the question on the basis of the information that has

1 been provided to the defendants, the documents that
2 have been provided to the defendants. That would be
3 the non-privileged, non-expert response that the client
4 currently has.

5 THE COURT: Mr. Blanchet said that only a
6 small number -- that the documents relate only to a
7 small number of the wells. So are you saying that your
8 client has no non-privileged information responsive to
9 those interrogatories with respect to the remaining
10 wells?

11 MR. MARTIN: As to those wells, where for
12 example there are not SWAP reports, there are not EDR
13 radius map reports, et cetera, that have been provided,
14 then, your Honor, that would be correct. There is not
15 non-privileged information that the client has. With
16 respect to the documents themselves and Mr. Blanchet's
17 characterization of it as applying only to a small
18 portion of the wells, I would defer to my colleague Ms.
19 Biehl on that, but we have produced what we have.

20 THE COURT: And the Court for the most part
21 has not been provided with the documents, the Bates
22 documents produced in discovery. They haven't been
23 attachments, with one or two exceptions, haven't been
24 produced to the Court, so I don't know what those look
25 like. But do they by their terms relate to specific

1 wells?

2 MR. MARTIN: They do --

3 MS. BIEHL: Your Honor --

4 Sorry, Scott, I was just going to go ahead
5 and take your invitation to explain the documents. I
6 also want to start by saying I'm happy to submit some
7 of these for in camera review. They haven't been filed
8 publicly because they have critical infrastructure
9 information, which is precise well locations
10 specifically.

11 One example of what these documents look
12 like is, for instance, a diagram of the well, a
13 description of how the well is built, the capture zone
14 of the well, including maps, various maps that are
15 attached to source water assessment reports that show
16 exactly where the capture zone is and when potential
17 land use is in the vicinity, what potential businesses
18 are in the vicinity, whether or not they relate to the
19 defendants' products. Those exist and have been
20 produced for every well regardless of the dioxane
21 contamination wells.

22 Mr. Martin, take it away if I screwed any of
23 that up, please.

24 MR. MARTIN: That's fine.

25 THE COURT: I don't know if that answers the

1 Court's question regarding, does one looking at -- the
2 question is, if one looks at the documents that have
3 been produced, to the extent that they identify other
4 potential sources or immediate sources, dischargers of
5 dioxane, do those relate to a specific well? Can one
6 determine that from it, and are plaintiffs representing
7 that those are the -- that's the sole non-privileged
8 information that Suffolk County Water Authority has
9 with respect to the information that's being sought in
10 interrogatories 1A and 1B?

11 MR. MARTIN: Your Honor, it's Scott Martin
12 again. I'm looking at one such document right now and
13 we did not want to burden you with the documents. We
14 could submit them for in camera review, of course. In
15 answer to --

16 THE COURT: But I want to know -- yeah, I
17 want an answer to my question. I'm not looking for a
18 further production.

19 MR. MARTIN: No, and I assumed as much. In
20 direct answer to your question, it specifically
21 identifies the wells with its coordinates and within
22 that radius map, a list of potential users of dioxane,
23 one of which I can say -- one of which is a distributor
24 and one of which is another we believe to be a customer
25 of the defendants. So the answer to your question,

1 your Honor, is yes.

2 THE COURT: Let me ask, if the interrogatory
3 was -- let's assume we're talking now about Suffolk
4 County in particular. Identify each source that you
5 know or suspect to have contributed to the 14 dioxane
6 in your water supply system. So if the question was
7 not teed to specific wells, is the information
8 concerning sources -- is the information that appears
9 in Exhibit A, the summary of plaintiffs' interrogatory
10 responses entitled "non-generic portion of response to
11 interrogatory 1B," is that the complete universe?

12 MR. MARTIN: Well, I'm looking at it right
13 now and I'm seeing ellipses on mine and I don't think
14 that's a quirk. But the answer is yes, your Honor,
15 we've produced -- what we have produced with respect to
16 specific wells at issue I believe would constitute what
17 would be produced with respect to the aquifer in the
18 aggregate in terms of our knowledge. But I'll ask Ms.
19 Biehl to confirm that's correct.

20 MS. BIEHL: That's correct. The documents
21 that have been produced are all-inclusive, period.

22 THE COURT: So the narrative portion --
23 putting aside for the moment the Bates numbers, the
24 narrative portion is a complete listing of sources
25 known by Suffolk County Water Authority or suspected by

1 the plaintiffs to have contributed to the
2 contamination.

3 MS. BIEHL: Your Honor --

4 MR. MARTIN: The --

5 MS. BIEHL: Go ahead, Scott.

6 MR. MARTIN: Go right ahead, Stephanie.

7 MS. BIEHL: Your Honor, the narrative
8 portion is complete, meaning describing that defendants
9 are the source of the dioxane. The list of Bates
10 numbers is likely not complete because these were
11 served in July and several more documents have been
12 produced. I don't know how many we'd need to add but
13 these EDR reports are thousands of pages long usually,
14 and all of those Bates numbers probably are not listed
15 in full for every plaintiff, but it is certainly
16 representative of what the plaintiffs know or suspect
17 to be the potential point sources of the defendants'
18 products.

19 THE COURT: That's what I'm getting at.
20 Putting aside whether or not the listing that appears
21 before me of the Bates numbers is complete, are there
22 other point sources that are known or suspected that
23 have not been disclosed to defendants?

24 MR. MARTIN: Your Honor, the answer to that
25 is no, and there are numerous point sources if you will

1 or intermediate sources, to use Judge Gershon's term,
2 that are identified in those documents by name.

3 THE COURT: Who is speaking now?

4 MR. MARTIN: That was Mr. Martin, your
5 Honor.

6 MR. BLANCHET: Your Honor, it's Mr.
7 Blanchet. If I may because I've shared that this
8 conversation has kind of gotten off course to the
9 information that we're looking for. The sources in the
10 water supply system are not something that helps us
11 understand the claims or narrow the cases. These cases
12 are well-specific and the contamination in each well
13 comes from different sources. All we want to know is,
14 for each well where there's dioxane in it, did the
15 plaintiff in the normal course of business know or not
16 know or suspect or not suspect where the source of the
17 contamination in each of the 600-plus wells at issue
18 came from. If the answer is no, just tell us no.
19 But the compilation of documents that just list
20 potential sources of contamination -- I mean, yes,
21 those need to be produced, but the purpose of this
22 interrogatory was to narrow the issue. What sources go
23 to what wells? If you don't know, just tell us you
24 don't know.

25 THE COURT: What I'm trying to get at is

1 whether or not all non-privileged documents have been
2 produced and what is going to be the source of the
3 knowledge of potential point sources? Presumably, it's
4 going to be the documents. So what you're asking for
5 is, you're asking the plaintiffs to go through all the
6 documents and then tie the point sources to specific
7 wells. If you have the documents, then you're capable
8 of doing that to the extent that that information is in
9 the documents. I understand that your defense is going
10 to be based on a well-specific approach. I gather the
11 plaintiffs are not in a position to provide information
12 beyond what's in the documents.

13 MR. BLANCHET: If that's the case, they
14 should just say that. That's it. There might be
15 sources of documents that they don't have possession
16 of. There are a lot of EPA documents, a lot of DEC
17 documents that do in-depth investigations. There are
18 well permitting documents, things of that nature, where
19 when they detect dioxane in a well, they may or may not
20 draw conclusions about, we know where the source of
21 that dioxane comes from. And if they didn't draw those
22 conclusions, say you didn't draw those conclusions.
23 Identify for us what well you've concluded goes with
24 what point source. In some cases, they did that. New
25 York American Water identifies those. That's all we're

1 looking for. And if the answer is, we don't know, we
2 would just like a verified response that says that.

3 MR. WINER: Your Honor, if I may just
4 briefly for a moment.

5 THE COURT: Is that Mr. Martin?

6 MR. WINER: No, this is Jed Winer on behalf
7 of Proctor & Gamble.

8 THE COURT: All right.

9 MR. WINER: I found this to be -- we're
10 obviously only in three of the cases but one of the
11 cases that we're in that I think this issue is
12 particular acute for is the Hicksville Water District
13 case, which we referenced in a footnote in our letter.
14 They have specifically sued previously over the same
15 wells and the same dioxane, naming different
16 defendants, and in each case alleged that they are the
17 full and direct sources of the dioxane in the wells.

18 So there is clearly some inconsistencies to
19 say the least, and when we served an interrogatory on
20 Hicksville, nothing in response, no documents that are
21 referenced, no identification of sources. We have to
22 assume that if Hicksville sued 50 defendants in another
23 case (ui) in the Eastern District, that they had a
24 basis for pursuing those defendants for being the
25 source of the contamination. In fact, one of the

1 wells, 4-2, they actually sued a defendant years ago
2 and settled with the defendant over that contamination.
3 So this is now the third time they're suing over well
4 4-2 for the same contamination. I just wanted to flag
5 that because that's one of the three cases we're in
6 where the response was particular deficient. Thank
7 you, your Honor.

8 THE COURT: Ms. Factor, why don't you
9 respond since that's directed specifically at your
10 client.

11 MS. FACTOR: Sure, your Honor. The
12 defendants have asked for and we have agreed to
13 produce, as have all the other plaintiffs, to produce
14 relevant and non-privileged documents. Just like these
15 other plaintiffs, we are undergoing additional
16 privilege review and it is true that my client has and
17 is currently actually suing some defendants that it
18 considers may be sources. That information for the
19 most part is attorney work product subject to expert
20 opinion and privilege. So while we are still, you
21 know, undergoing that review, the vast majority of that
22 documentation is privileged. That would be the reason
23 that we haven't produced it, as we have explained in
24 our correspondence.

25 THE COURT: Well, I don't see your client as

1 standing on the same footing as some of the other
2 plaintiffs. If you've already sued other defendants,
3 then presumably, there is non-privileged information
4 relating to those other defendants who are being sued,
5 and there's no indication that you pointed to that in
6 responding to this interrogatory.

7 MS. FACTOR: Well, your Honor, we have
8 produced -- just like the other plaintiffs, we have
9 produced reports and SWAP reports, and all the same
10 information as all the other plaintiffs, which
11 generally show the sources for each well and the
12 suspected sources. But specifically with respect to
13 possible defendants, subject to -- you're right. In
14 the ordinary course of business, to the extent that
15 there's maybe a report from a public agency, yes, we
16 would produce that. But if there was information
17 collected for purposes of the litigation, we would
18 argue that that would be covered by work product and
19 privilege.

20 THE COURT: I'm just getting a lot of
21 double-talk now and my patience is wearing very thin.
22 To the extent that the plaintiffs have produced and
23 identified all responsive, non-privileged documents,
24 the Court is not inclined to require the plaintiffs to
25 go through well by well and try to make the

1 correlation, if it's going to be based on the same
2 documents that have been produced to the defendants.
3 But I'm really not satisfied that all the documents
4 have been produced, that all the plaintiffs have
5 provided sufficient responses and identifications of
6 documents, and we really need to move this case along.

7 So I think this is going to have to be the
8 subject of further discussions among counsel, and if
9 you can't resolve it, then you'll have to come back
10 again and come back quickly. So as I said, I want a
11 status report a week from today but I really want the
12 parties to seriously dig into these issues and make
13 progress, and either tell me that you've resolved them
14 or that you expect to resolve them within another week,
15 or if they haven't been resolved, then they're going to
16 have to be teed up for resolution, and I will then
17 issue specific orders but based on a more complete
18 record and my understanding of what has been provided
19 and what's available for production.

20 MR. BLANCHET: Thank you, your Honor.

21 THE COURT: We really need to move these
22 cases along and not have the parties playing hide the
23 ball. I am not going to require make work on the part
24 of plaintiffs so that they have to go through, as I
25 said before, well by well and start figuring out, all

1 right, we've given them a list of 20 other point
2 sources or intermediate sources and now let's figure
3 out which well each one relates to. But it may well be
4 that the plaintiffs ought to be up front about they
5 know and what they don't know because otherwise, they
6 may have to sit for depositions and be asked these
7 questions.

8 Is there anything else that we need to
9 address today?

10 MR. BLANCHET: No, your Honor. Thank you
11 for your time.

12 MR. MARTIN: No, thank you, your Honor.

13 THE COURT: All right. We did have a number
14 of attorneys who were mostly going to be deferring to
15 Ms. Biehl and -- well, we had lead counsel -- is there
16 anyone else who wants to be heard who hasn't been?

17 MR. DILLARD: Your Honor, this is Mr.
18 Dillard on behalf of the defendant Vulcan. I just had
19 a question. If I understand Mr. Martin a few moments
20 ago, he mentioned that there are nine additional wells
21 that will now be in the case because, as he says, the
22 plume or plumes have moved. That was for Suffolk
23 County.

24 THE COURT: He said there are 270 wells now
25 that are at issue because the plumes have moved.

1 MR. DILLARD: Okay. So my question would
2 be --

3 THE COURT: You want to know which 8 ones,
4 which 8 wells?

5 MR. DILLARD: We certainly need to know
6 that. We have 56 days from today by my count to join
7 third parties in 27 cases, so you can I'm sure
8 appreciate the urgency that we feel about this issue.

9 THE COURT: Mr. Martin, why don't you
10 identify those newly-added wells, even if there hasn't
11 been a formal interrogatory? Why don't you provide it
12 so that we're not back here arguing over it.

13 MR. MARTIN: Your Honor, we absolutely will
14 provide that and we will provide the full list of the
15 278, and I expect to do that (ui) tomorrow.

16 THE COURT: Very good.

17 MR. DILLARD: Thank you.

18 THE COURT: Anything else?

19 MR. DILLARD: Just a comment, your Honor.
20 That's for Suffolk County and of course, we have the
21 same request for all of the other 26 plaintiffs, if
22 there are going to be any additional wells.

23 THE COURT: All right, those are less time
24 sensitive but the defendants are entitled to that
25 information.

1 MR. DILLARD: Your Honor, respectfully,
2 they're not less time sensitive with respect to the
3 third-party joinder deadline of July 16, as I
4 understand it.

5 THE COURT: All right, point taken.

6 MS. BIEHL: Your Honor --

7 THE COURT: Who was just speaking, just so
8 the record is clear.

9 MR. DILLARD: That was Mr. Dillard on behalf
10 of Vulcan, your Honor.

11 THE COURT: All right. Someone else wanted
12 to be heard?

13 MS. BIEHL: Yes, your Honor, this is
14 Stephanie Biehl. I was just going to speak on behalf
15 of the remaining plaintiffs that the Sher Edling firm
16 represents. We will identify a list of wells for those
17 plaintiffs as soon as we can and we will start doing
18 that next week.

19 THE COURT: Is there any reason why you
20 can't start doing that this week, tomorrow?

21 MS. BIEHL: We can start doing it today. I
22 meant start the production next week. We certainly
23 have already started doing that.

24 THE COURT: All right. Anything else?

25 MR. DILLARD: Your Honor, Mr. Dillard again.

1 Might I inquire about New York American Water and
2 Hicksville, the same question?

3 THE COURT: You can inquire about it but
4 don't inquire of me, inquire of plaintiffs' counsel
5 after this proceeding has concluded.

6 All right, I'm going to conclude this
7 proceeding. I'll expect to see your joint status
8 report by next Thursday, the 27th. I'm going to
9 conclude the proceeding. Everyone please take care and
10 stay safe. Goodbye.

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18 I certify that the foregoing is a correct
19 transcript from the electronic sound recording of the
20 proceedings in the above-entitled matter.
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25 ELIZABETH BARRON

May 24, 2021